Filed 4/19/17 P. v. Bessette CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONALD JOSEPH BESSETTE, Defendant and Appellant.	D069633 (Super. Ct. No. SCE352903)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel G. Lamborn, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Donald Joseph Bessette of transportation of controlled substances (Health & Saf. Code,[1] § 11379; count 1) and possession for sale of a controlled substance (§ 11378; count 2). It found true as to count 2 that the substance contained 28.5 grams or more of methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)). The court sentenced Bessette to a split four-year term on count 1, with two years to be served in local custody and two years under mandatory supervision. It imposed but stayed the count 2 sentence under Penal Code section 654. As conditions of mandatory supervision, the court required Bessette to submit his computers, recordable media and personal phone to a search as required by the probation officer or law enforcement officer; and, obtain his probation officer's permission as to his residence and employment.

Bessette contends the trial court prejudicially erred by (1) inadequately instructing the jury regarding constructive possession of narcotics by failing to address the affirmative defense of transitory possession, thus depriving him of his federal constitutional right; and (2) excluding testimony regarding an assault Bessette allegedly suffered shortly before trial. He maintains that (3) the cumulative effect of these errors requires reversal. Bessette further contends (4) the court erroneously imposed mandatory supervision requirements that he submit to an electronic search, and obtain his probation officer's permission as to his residence and employment. We conclude the trial court did not err and therefore affirm the judgment.

---

1 Statutory references are to the Health and Safety Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

San Diego County Sheriff's Deputy Shawn Wray testified that on August 13, 2015, he was on patrol and saw a vehicle that had entered a crosswalk in violation of the Vehicle Code. He turned on his overhead lights and pulled over the vehicle. Both the driver, Raul Contreras, and the passenger, Bessette, appeared nervous. Deputy Wray observed Bessette three or four times move his hands from the top of his legs to the right side of his legs to an area between his right leg and the passenger side door, which was outside of Deputy Wray's view. He cautioned Bessette to stop that movement, and Bessette complied. A backup deputy arrived and they discovered the vehicle was reported as stolen. They detained both occupants. They found a plastic bag containing 77.5 grams of methamphetamine by the passenger seat. Bessette had $520 in 20 dollar bills on his person. Contreras claimed ownership of all the personal property in the vehicle.

San Diego County Sheriff's Deputy Rick Ellington, a narcotics expert, testified that the sheer quantity of methamphetamine found would indicate it was for sale; further, the large amount of cash found would indicate that part of the methamphetamine was probably sold off. According to Deputy Ellington, the current price of methamphetamine was $40 to $50 per gram.

Defense Case

Craig Hodge testified he had hired Bessette to help him with a construction project and on July 31, 2015, he had paid Bessette $850 in twenty dollar bills plus a ten-dollar bill. Hodge testified he saw Bessette give his mother $300 of that money.

Bessette testified that when Deputy Wray pulled over the vehicle, Contreras grabbed the bag of methamphetamine and tossed it over Bessette's lap, telling him to put it somewhere. Bessette knew the bag contained methamphetamine and decided to brush it off to the side because he didn't want to touch it. Bessette told the deputy that day that he did not know anything about the car, and that its contents belonged to Contreras. Bessette denied the methamphetamine belonged to him, or that he was trying to sell, transport, or hide it. When defense counsel asked Bessette why he had not immediately told Deputy Wray on the day of the incident that Contreras had tossed the drugs on Bessette's lap, Bessette replied that he did not want to get himself or Contreras in trouble, or be labeled as a snitch or a rat. Bessette admitted he had a prior conviction for false impersonation.

DISCUSSION

I.

The Instructional Error Claim Fails

Although framed as two separate contentions in his appellate brief, Bessette essentially makes one claim of instructional error: that the court's instruction regarding constructive possession violated his federal constitutional right to due process because it did not also sua sponte address the affirmative defense of transitory possession in the

language of CALCRIM No. 2305. Bessette challenges the court's instruction of the jury as to counts 1 and 2 regarding constructive possession with CALCRIM Nos. 2300 (transportation of controlled substance), 2302 (possession for sale of controlled substance) and 2304 (simple possession of controlled substance) with the following language: "A person does not have to actually hold or touch something to transport [or possess] it. It is enough if the person has control over it or the right to control it, either personally or through another person."[2] Bessette contends that neither his testimony nor that of Deputy Wray supported instruction with that clause. Bessette further contends he did not voluntarily and consciously possess the drugs; therefore, the court instructed the jury on an inadequate theory of guilt.

We review an assertion of instructional error de novo. (See *People v. Shaw* (2002) 97 Cal.App.4th 833, 838.) Whether the trial court should have given a "particular

---

2 The version of CALCRIM No. 2302 read by the trial court provides: "The defendant is charged in Count 2 with possession for sale of methamphetamine, a controlled substance. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. When the defendant possessed the controlled substance, he intended to sell it; [¶] 5. The controlled substance was methamphetamine; [¶] AND [¶] 6. The controlled substance was in a usable amount. [¶] *Selling* for the purpose of this instruction means exchanging methamphetamine for money, services, or anything of value. [¶] *A usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces or debris are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user. [¶] The People do not need to prove that the defendant knew which specific controlled substance he possessed. [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

instruction in any particular case entails the resolution of a mixed question of law and fact," which is "predominantly legal." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) As such, it should be examined without deference. (*Ibid*.)

" '[O]ne may become criminally liable for possession for sale . . . of a controlled substance, based upon either actual or constructive possession of the substance,' " and " '[c]onstructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another.' " (*People v. Thomas* (2012) 53 Cal.4th 1276, 1284.) Circumstantial evidence and any reasonable inferences drawn from it may establish possession. (*People v. Martin* (2001) 25 Cal.4th 1180, 1184; see *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1427.)

In *Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, the court stated: "For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance. Implementation of this policy necessarily encompasses a potentially wide variety of conduct in a wide variety of settings, all directed by such factors as the alleged offender's capacity to direct the illicit goods, the manifestation of circumstances wherein it is reasonable to infer such capacity exists and the degree of direction being exercised by the accused over the contraband." (*Id.* at p. 539.) The court in *People v. Montero* (2007) 155 Cal.App.4th 1170, at page1176, held that CALCRIM No. 2302 correctly states the knowledge requirement and the possession requirement.

Bessette fails to persuade us the jury would have misinterpreted the intent required for a conviction. Based on the totality of the situation, we conclude the court did not abuse its discretion in instructing the jury with the correct statement of the law regarding constructive possession. Bessette's defense was that Contreras threw the contraband in Bessette's lap, and he immediately tossed it aside. The instruction was necessary to help the jury understand that Bessette could possess narcotics even when he might not hold it in his hands.

The trial court's duty to instruct sua sponte on defenses was explained in *People v. Breverman* (1998) 19 Cal.4th 142: "In the case of *defenses*, . . . a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*Id.* at p. 157.) The *Breverman* court thus directed that "when the trial court believes 'there is substantial evidence that would support a *defense* inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.' " (*Id.* at p. 157.)

Bessette's reliance on *People v. Mijares* (1971) 6 Cal.3d 415, in which the appellate court held that the trial court was required to instruct the jury sua sponte that the defendant momentarily handled narcotics prior to abandoning it, is unavailing. (*Id.* at p. 423.) That court concluded that the defendant by throwing away the narcotics had demonstrated his intent to abandon the narcotics; the defendant even voluntarily waited for the police to arrive. (*Id.* at p. 422.) By contrast, the trial court here did not err by declining sua sponte to instruct the jury regarding transitory possession, because no

substantial evidence supported that instruction. Although Bessette knew the methamphetamine was in the vehicle, he testified he did not tell the deputy sheriffs about it. This indicates he did not intend to abandon the drugs. By his actions, the jury could reasonably conclude that he intended to conceal from law enforcement the fact the drugs were in the vehicle.

If Bessette wanted to expand on the standard instruction or modify it to take into account his claim he did not voluntarily possess the methamphetamine, it was incumbent on him to request a pinpoint instruction. The defendant may request instructions that elaborate or "pinpoint" his or her theory of the case. (*People v. Dennis* (1998) 17 Cal.4th 468, 514; *People v. San Nicolas* (2004) 34 Cal.4th 614, 670.) The trial court is not required to create such a pinpoint instruction absent a request, and the instructions are adequate if they otherwise tell the jury all the applicable legal principles pertinent to a case. The trial court is not obligated to instruct the jury with the precise language requested by a party, even if the proposed instruction better states the rule. (*People v. Williams* (1980) 101 Cal.App.3d 711, 719.) A defendant's failure to request a clarifying or amplifying instruction at trial forfeits any argument on appeal that the instruction given was ambiguous or incomplete. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

Bessette's reliance on *People v. Barnes* (1997) 57 Cal.App.4th 552 is unavailing. In that case, a defendant sought to purchase cocaine but received a fake rock instead. When the defendant demanded that his seller give him real drugs, arriving police saw the seller throw the real cocaine on the defendant's chest; the defendant never held it or controlled it. (*Id.* at p. 557.) By contrast, here, Bessette admitted he held the drugs, at

least sufficiently to remove it from his person. But more importantly, he did not otherwise disclaim the drugs when police stopped the vehicle. Likewise, in *Armstrong v. Superior Court*, *supra*, 217 Cal.App.3d at page 538, the court pointed out that in the context of a drugs sale, when the seller was about to hand over the narcotics to the defendant, the undercover police moved in and arrested the defendant. Therefore, the defendant did not exercise the requisite control to establish constructive possession. (*Id.* at p. 540.) Such was not the case here.

When examining an ambiguous or purportedly erroneous instruction under the United States Constitution or California law, we inquire "whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation" of such laws. (*People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Young* (2005) 34 Cal.4th 1149, 1202.) In deciding the issue, we consider the specific language challenged, the whole of the instructions, argument of counsel, and the jury's findings. (*People v. Holt* (1997) 15 Cal.4th 619, 699; *People v. Franco* (2009) 180 Cal.App.4th 713, 720.) Reversal is not required unless it is reasonably likely the jury misunderstood and misapplied the court's instructions to appellant's detriment. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

Here, during closing arguments defense counsel argued transitory possession, telling the jury without objection that the People's argument was limited to a showing "that Mr. Bessette was moving his hands in the area where the drugs were found, and that's true. It's not being contested. Mr. Bessette was moving his hands, but he wasn't hiding anything. He was nervous, as any of us would be if you were in a car pulled over by the police and someone had just thrown a bag of drugs into your lap." Defense

counsel added: "[Bessette] has to possess the drugs, and he didn't. Okay. If I throw you something right now, that doesn't mean you possess it. That doesn't mean you have control over it. . . . It is not about whether he can reach over and grab it. Okay. Like I could reach and grab this notebook. That doesn't mean I have dominion and control, just because I can." Based on counsel's remarks, the jury was fully aware of Bessette's defense that he did not possess the drugs. If it had any doubt on this point it would have acquitted him. However, in light of its guilty verdict, we may reasonably assume it found Bessette's testimony not credible. Assuming error, it was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24.

II.

No Abuse of Discretion in Excluding Evidence of Bessette's Purported Assault

Bessette contends the trial court abused its discretion "when it excluded evidence that [he] was physically assaulted and labeled a 'snitch' shortly before the jury trial because it was highly relevant to his credibility as a witness," thus depriving him of his constitutional right to a fair trial. (Capitalization omitted.)

A. *Background*

During direct examination of Bessette, defense counsel sought to elicit testimony regarding the cause of Bessette's black eye and swollen arm. The prosecutor objected on relevance grounds. Defense counsel argued: "The relevance is to [Bessette's] state of mind, the fact that he's [on the witness stand], nervous, his voice is shaking. I believe the prosecutor is going to get up and say [Bessette's] lying, and an alternate explanation for that is he's afraid." Defense counsel sought the court's permission to question Bessette

about his injuries stemming from an assault. The prosecutor again objected: "It is irrelevant as to showing any kind of state of mind at this point, that he got beat up last Thursday. [¶] As far as the facts in this case go, the jury is well aware of his physical appearance. They're looking right at him. Bringing in unsubstantiated claims that he's been beaten up for whatever reason, no police reports were brought forward, no corroboration that this was done in any malicious purpose pertaining to this case, it's inflammatory as far as the People's case, because it's all completely unsubstantiated, so you know, I think I would object to all questioning concerning his physical appearance. [¶] This trial happened weeks later and we don't know if he punched himself in the eye, to be honest with you, and to just make the jury sympathetic. I don't find it appropriate." The court sustained the objection under Evidence Code section 352: "I don't see the relevance of it. He's in construction. A million things can happen that cause you to get injured."

Thereafter, the prosecutor asked Bessette if he was "afraid of testifying that these drugs belonged to Contreras." Bessette answered in the affirmative, explaining that he did not want "to be classified as a snitch or a rat"; adding, "[b]ecause you get beat up, hurt. I live with my mom. I would hate for anything to happen to my mom's house because of something that I had said or done." Bessette also testified his right eye and right hand were injured.

B. *Applicable Law*

The trial court has "broad discretion under Evidence Code section 352 'to exclude even relevant evidence "if its probative value is substantially outweighed by the

probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 60.) "An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*Id.* at p. 74; see *People v. Vargas* (2001) 91 Cal.App.4th 506, 545, 543 [trial courts "have wide discretion in determining the relevancy of evidence"; no abuse of discretion under Evidence Code section 352 unless the court " ' "exceeds the bounds of reason, all of the circumstances being considered" ' "].)

C. *Analysis*

The court did not abuse its discretion by excluding the proffered testimony regarding the cause of Bessette's recent injuries as irrelevant to the charges of possession and transportation of methamphetamine for sale. Under Evidence Code section 352, any probative value of testimony regarding the source of Bessette's injuries would be outweighed by prejudice. It would require a time-consuming trial within a trial, because witnesses to the assault would have to be called to testify, and possibly confuse the jury. Further, there was no constitutional violation. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 503 [discretionary evidentiary ruling did not violate right to present a defense]; *People v. Gurule* (2002) 28 Cal.4th 557, 620 [ordinary rules of evidence generally do not infringe on the right to present a defense; argument that restricted cross-

examination violated rights to confrontation, due process, and a fair trial rejected]; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [exclusion of defense evidence on a subsidiary point is not a deprivation of due process].)

As to the collateral matter of Bessette's fear of retaliation for his testimony, which might have impacted his credibility, the court permitted him to testify he was nervous, afraid of being labeled a snitch, and that individuals who are considered snitches get beat up, and he feared for his and his mother's safety. Such testimony sufficed to address the credibility issue.

IV.

No Cumulative Error

Bessette contends the cumulative impact of the trial court's errors requires reversal. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' " (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009.)

Since we have found none of Bessette's claims of error prejudicial, a cumulative error argument cannot be sustained. No errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict in this case. (*People v. Martinez* (2003) 31 Cal.4th 673, 704.)

V.

Challenges to Mandatory Supervision Conditions

A. *Search of Computers, Recordable Media, and Personal Telephone*

Bessette contends the mandatory supervision condition requiring him to submit his computers and electronic devices to warrantless searches is unconstitutionally overbroad, restricting his Fourth Amendment right to privacy. We disagree.

1. *Background*

At the sentencing hearing, the court pointed out Bessette had a "significant" 25-year long criminal history consisting of numerous prior convictions. It added, "His prior performance, as indicated in the denial of probation on parole and probation, has been poor." The prosecutor requested as a condition of mandatory supervision that the court order Bessette to sign an order "specifically for the Electronic Communications Protective Act." Defense counsel objected that such an order was not included in the probation report. The trial court imposed probation condition 1(m), requiring Bessette to submit his "person, vehicle, residence, property, personal effects, computers, recordable media and personal phone to a search at any time with or without a warrant, and with or without reasonable cause, as required by [the probation officer] or law enforcement officer." The court explained to defense counsel, "So I'll meet you part of the way." Defense counsel did not object further.

2. *Applicable Law*

"[T]he Legislature has decided a county jail commitment followed by mandatory supervision imposed under [Penal Code] section 1170, subdivision (h), is akin to a state

prison commitment; it is not a grant of probation or a conditional sentence." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.) Therefore, "mandatory supervision is more similar to parole than probation." (*Id.* at p. 1423.) Courts analyze the validity of the terms of supervised release under standards "parallel to those applied to terms of parole." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 763.)

"The fundamental goals of parole are to help ' "individuals reintegrate into society as constructive individuals" [citation], " 'to end criminal careers through the rehabilitation of those convicted of crime' " [citation] and to [help them] become self-supporting.' " (*People v. Martinez, supra,* 226 Cal.App.4th at p. 763.) To further these goals, "[t]he state may impose any condition reasonably related to parole supervision." (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1233.) These conditions "must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the parolee." (*Id.* at p. 1234.)

"The validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions." (*People v. Martinez, supra*, 226 Cal.App.4th at p. 764.) "A condition of [parole] will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.] Conversely, a condition of [parole] which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted (*Lent*).)

"In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*People v. Martinez, supra,* 226 Cal.App.4th at p. 764.) Thus, imposition of mandatory supervision conditions is reviewed for abuse of discretion. (*Ibid.*) A superior court abuses its discretion when the condition " 'is arbitrary, capricious or exceeds the bounds of reason under the circumstances.' " (*Ibid.*)

3. *Analysis*

Here, the court did not abuse its discretion in imposing the electronics monitoring condition. In light of Bessette's lengthy criminal history and poor performance on probation and parole, the court reasonably could conclude that this condition was related to the deterrence of future criminality that might be committed via electronic media. Moreover, an electronic search condition would assist probation officers to ensure Bessette complies with the numerous other conditions imposed.

Bessette cites to *People v. Appleton* (2016) 245 Cal.App.4th 717, in which the defendant pleaded guilty to false imprisonment by means of deceit as part of a plea bargain after initially being charged with oral copulation with a minor, whom he had met via a social media smartphone application. (*Id.* at pp. 719-720.) The defendant was placed on probation, one of the conditions of which provided that the defendant's electronic devices "shall be subject to forensic analysis search for material prohibited by law." (*Id.* at p. 721.) The defendant appealed this condition under *Lent* and constitutional grounds. (*Id.* at pp. 721-722; *Lent, supra,* 15 Cal.3d 481.)

The Court of Appeal found the electronics-search condition did "not run afoul of the first *Lent* factor requiring 'no relationship to the crime' " (*People v. Appleton, supra*, 245 Cal.App.4th at p. 724; *Lent, supra*, 15 Cal.3d at p. 486), but concluded the condition was unconstitutionally overbroad (*id.* at pp. 725-727). The court reasoned the condition "would allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality" (*id.* at p. 727), such as his "medical records, financial records, personal diaries, and intimate correspondence with family and friends." (*Id.* at p. 725.) In reaching this conclusion, the *Appleton* court relied on the Supreme Court's rationale in *Riley v. California* (2014) __ U.S. __[134 S.Ct. 2473] (*Riley*), which held that a warrantless search of a suspect's cell phone incident to arrest implicated and violated his Fourth Amendment rights. (*Riley*, at p. 2493.) The Supreme Court emphasized the wealth of information contained in modern cell phones. (*Id.* at pp. 2489-2490.) The *Appleton* court struck the probation condition and remanded for the trial court to fashion one more narrowly tailored. (*Appleton*, at pp. 728-729.)

The court in *In re J.E.* (2016) 1 Cal.App.5th 795[3] concluded the *Riley* court's privacy concerns in the context of a search incident to arrest are inapposite in the context

---

3 The California Supreme granted review in *In re J.E., supra,* 1 Cal.App.5th 795, review granted October 12, 2016, S236628. The following issue is certified for review in a series of cases: Did the trial court err by imposing an "electronics search condition" on minor as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 because it would facilitate his supervision? (*In re Ricardo P*. (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923.) Following its grant of review in *Ricardo P.*, the Supreme Court granted review in the following related cases: *In re Patrick F.* (2015) 242 Cal.App.4th 104,

of determining the constitutional reasonableness of probation conditions allowing searches of electronic devices. (*In re J.E.*, at pp. 803-804.) Unlike the defendant in *Riley* "who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence," a probationer does not enjoy " ' " 'the absolute liberty to which every citizen is entitled.' " ' " (*In re J.E.*, at p. 804.) That is, " 'Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.' " (*Ibid.*, quoting *United States v. Knights* (2001) 534 U.S. 112, 119.) The *In re J.E.* court recognized that although electronics may be a " 'bottomless pit' " of personal information, "courts have historically allowed . . . probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read." (*Id.* at p. 804, fn. 6.) The court pointed out the absence of evidence in the record indicating the probationer's electronics contained any of these types of sensitive information. (*Ibid.*) The court further noted that the Supreme Court in *Riley* clarified that although cell phone data is

---

review granted February 17, 2016, S231428; *In re Alejandro R.* 243 Cal.App.4th 556, review granted March 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849; *In re A.S.* (2106) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E., supra*, 1 Cal.App.5th 795, review granted October 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210. (Cal Rules of Court, Rule 8.1105(e)(1)(B).)

subject to Fourth Amendment protection, it is not " 'immune from search.' " (*In re J.E.*, at p. 804, quoting *Riley*, *supra*, 134 S.Ct. at p. 2493.) The *In re J.E.* court thus concluded that although the probationer's right to privacy was *implicated* by the electronics search condition, the right was not *violated* under the circumstances. (*Id*. at p. 805.) We find *In re J.E.* persuasive.

B. *The Residency and Employment Requirement*

Bessette contends the mandatory supervision requirement that he obtain his probation officer's approval of his residence and employment is constitutionally overbroad because it restricts his constitutional freedom to travel, seek employment and associate; therefore, it must be stricken. He argues this requirement gives too much discretion to the probation officer to act unilaterally to curtail his constitutional rights.

Because Bessette was convicted of possessing and transporting for sale a usable amount of a controlled substance, the appropriate inquiry is whether the condition that he obtain the probation officer's approval as to residence and employment is reasonably related to his supervision. We reject Bessette's reliance on *People v. Bauer* (1989) 211 Cal.App.3d 937, which is distinguishable on its facts. Bessette committed the serious crimes of possessing a significant amount of methamphetamine and transporting it for sale. Under these circumstances, where he lives may directly affect his rehabilitation. For example, without any limitations, he could choose to live in a residence where drugs are used or sold. Thus, the state's interest in Bessette's rehabilitation is properly served by the residence-approval condition. Moreover, probation conditions "should be given 'the meaning that would appear to a reasonable, objective reader.' " (*People v. Olguin*

(2008) 45 Cal.4th 375, 382.) We presume a probation officer will not withhold approval of a residence for an irrational or capricious reason. (*Id.* at p. 383.) We conclude that the trial court did not abuse its discretion in imposing the condition that Bessette, as a term of his mandatory supervision, obtain the approval of his probation officer as to his residence and employment.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.